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**WILD ROSE FOUNDATION – VITALIZE 2008**

**DIRECTOR’S AND OFFICER’S LIABILITY:  
THE ESSENTIALS AND BEYOND  
FOR CHARITIES AND NONPROFITS**

**Edmonton – June 13, 2008**

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**Part III  
How to Avoid Legal Liability in Fundraising  
(Alberta)**

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**By Terrance s. Carter, B.A., LL.B., Trade-Mark Agent**  
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A. OVERVIEW

- Legal Responsibility of Charities and Directors in Fundraising
- Developing a Proactive Risk Management Approach to Fundraising
- The *Charitable Fund-raising Act* (Alberta)
- CRA’s Proposed New Fundraising Policy
- Donor’s Rights and Remedies in Fundraising
- Avoiding Liability from Testamentary Charitable Gifts
- Avoiding Liability from Donor Restricted Charitable Gifts
- Avoiding Liability in Gift and Fundraising Programs

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B. RESOURCE MATERIALS

- [www.charitylaw.ca](http://www.charitylaw.ca)
  - Article entitled “*Looking a Gift Horse in the Mouth - Avoiding Legal Liability in Fundraising*”
  - Article entitled “*Donor Restricted Charitable Gifts A Practical Overview Revisited II*” Part I and Part II – April 21, 2006
  - Charity Law Bulletins #8, #9, #13, #17, #21, #23, #35, #72, #98 and #138
- [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)
  - Submission to the University of Iowa 2008 Provost’s Forum on International Affairs: “*The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for Balance*”

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**C. LEGAL RESPONSIBILITY OF CHARITIES AND DIRECTORS IN FUNDRAISING**

- Improper or negligent actions by development officers or fundraisers may expose a charity and its directors to legal liability
- The court held in *The Aids Society for Children (Ontario) (2001)* that
  - Third party fundraisers and subcontractors are agents of the charity and may cause liability for both the charity and its board of directors personally

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- Fundraising contracts which provide for unreasonable compensation (i.e. 70% to 80%) will be voidable based upon both violation of public policy and/or misrepresentation
- Misrepresentation is determined by the perception of the donor, not by the intent of the charity or its directors in receiving the gifts
- The fiduciary duty of a charity and its board of directors to account for donations applies to the gross amount of donations raised by third party fundraisers, not to the net amount that the charity may be entitled to pursuant to a fundraising contract

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- The directors were found personally liable for unreasonable fundraising costs in the amount of \$766,000
- Fundraising companies were required to repay unreasonable fundraising costs
- The directors were subjected to a penalty of \$50,000.00 under the *Charities Accounting Act (Ontario)*
- The court in *National Society for Abused Women and Children (Ontario) (2002)* confirmed
  - Fiduciary obligation of directors to account for unconscionable fundraising costs
  - Fundraising contract was declared void *ab initio* as being contrary to public policy

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- Donors are entitled to know about fundraising and administrative costs when making donations
- For more information on these cases, see Charity Law Bulletins #9, #13 and #17 at [www.charitylaw.ca](http://www.charitylaw.ca)
- Public Guardian and Trustee in Ontario obtained a restraining order against a Nova Scotia charity operating in Ontario involving 78% fundraising costs (*Canadian's Against Child Abuse Society*)
- The “buck” stops with the board of directors of a charity after everyone else has left the charity
- The board of directors must therefore be made familiar with all fundraising programs and the liabilities that are associated with those programs

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- D. DEVELOPING A PROACTIVE RISK MANAGEMENT APPROACH TO FUNDRAISING**
- Legal liability in fundraising can be reduced by developing a proactive legal risk management approach to fundraising
  - Fundraising must comply with the applicable corporate objects and powers of the charity
    - The fundraising program must not be *ultra vires* the charitable objects of the charity
    - The charitable purpose being furthered by fundraising must not be *ultra vires* the charitable objects
    - A donor restricted gift resulting from fundraising must not be *ultra vires* the charitable objects

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- Fundraising must not violate applicable statutory provisions
  - Selected specific charitable statutes affecting fundraising
    - *Charitable Fund-raising Act (Alberta)*
    - *Income Tax Act (Canada), including proposed new CRA Policy on Fundraising*
    - *Charities Accounting Act (Ontario)*
    - *Charitable Gifts Act (Ontario)*
    - *Religious Organizations Land Act (Ontario)*
    - *Charitable Purposes Preservation Act (British Columbia)*

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- *The Charities Endorsement Act (Manitoba)*
- *Charities Act (PEI)*
- *Charitable Fund-raising Businesses Act (Saskatchewan)*
- *Anti-terrorism Act (Canada)*
- *Taxation Act (Quebec)*
- Uniform Law Reform Conference has released draft uniform fundraising legislation see website [www.ulcc.ca/en/home](http://www.ulcc.ca/en/home) (not yet adopted in any Province)
- Fundraising must not involve gifts that are contrary to public policy
  - Charitable gifts involving discrimination
  - Charitable gifts involving illegal activities

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- E. CHARITABLE FUND-RAISING ACT (Alberta)**
- General
    - In general, charitable organizations that intend to raise or do raise over \$25,000 in gross contributions from solicitations in a financial year or use the services of a fundraising business must be registered under Alberta’s *Charitable Fund-raising Act* (“CFA”) (s. 12)
      - The three key responsibilities with the CFA are, disclosure obligations, record keeping and financial statements
      - S. 3 - the CFA does not apply to solicitations made by organizations if they:
        - Only ask their members and their immediate families for contributions

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- Ask for goods or services that will be used for administration within the organization, or other non-charitable purposes, or
- Are made in respect of a gaming activity that is authorized by a licence under the *Gaming and Liquor Act*
- Charitable organizations may hire a fund-raising business to conduct their solicitations or to manage their fund-raising activities
- A fund-raising business must be licensed under the CFA (s. 22) and must have a written fund-raising agreement with the charitable organization, containing certain prescribed information (ss. 29, 30)

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- **Recording and financial obligations under the CFA**
  - **Charitable and fund-raising businesses that solicit donations for a charitable purpose must maintain the following records for at least 3 years (s. 7):**
    - **Original financial statements**
    - **Records of all solicitations**
    - **Records of the bank account (if any) used for deposits and any payments from that account**
    - **Names of the signing officers for the bank account**
    - **Samples of the information given to potential donors, including publications and phone scripts**

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- **Copies of the fund-raising agreement and any amendments**
- **Copies of cash receipts**
- **Charitable organizations that raise more than \$250,000 in gross contributions must prepare audited financial statements, and those that raise less than \$250,000 must prepare a financial information return (s. 8)**
  - **The information that must be provided in these documents is set out in s. 7 of Alta. Reg. 108/2000, and includes gross contributions, total dispositions and remuneration to employees and fundraisers**
- **Charitable organizations/fund-raising businesses must provide donors with a receipt for contributions if requested (s. 10)**

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- **Disclosure obligations**
  - **A fund-raising business or a charitable organization that makes a solicitation in person must, before accepting a contribution, provide certain information (and adequate time to review it) to each donor:**
    - **The name of the charitable organization**
    - **The applicable charitable purpose**
    - **The cost of fundraising and how much the charity expects to raise**

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- The address and phone number of a contact person
- Operating name of the fundraising business
- How the remuneration of the fundraising business is determined
- Additional information must be provided to “any person who requests it”, including a copy of the organization’s most recent audited financial statements (s. 9)

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- General prohibitions for charitable organizations and fund-raising businesses (s. 47)
  - Must not imply that they are endorsed by the Government of Alberta simply because they are registered
  - Must not claim that anyone sponsors or approves of their cause without the written consent of the parties involved
  - Cannot say they are asking for contributions to be used for a specific charitable purpose if the contributions will not be used in that way
  - Cannot make false statements or misrepresent facts in their solicitations

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- No one may ask for donations for any charitable purpose or charitable organization or use their emblem or printed matter, without their written consent (s. 47(1)(d))
- A charitable organization or fund-raising business must use their best efforts to remove a person’s name from their donor list and stop sending requests for donations if asked to do so (s. 50)

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• Standards of Practice

- The following standards of practice apply to all charitable organizations and fund-raising businesses (See Government of Alberta Information Sheet “Standards of Practice: The Charitable Fund-raising Act”, available at: [http://www.servicealberta.gov.ab.ca/pdf/charities/cfra\\_standards\\_of\\_practice.pdf](http://www.servicealberta.gov.ab.ca/pdf/charities/cfra_standards_of_practice.pdf))
- Charitable organizations and fund-raising businesses must:
  - Comply with all relevant municipal, provincial, and federal laws
  - Advocate, within the organization, adherence to all applicable laws and Standards of Practice

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- Give donors the opportunity to have their names removed from lists that are sold, rented, or exchanged with other organizations
- To the best of their ability, ensure that contributions are used in accordance with donors’ intentions
- Obtain the explicit consent of a donor or the donor’s representative before altering the conditions of a gift
- Use accurate and consistent accounting methods

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- Not disclose any personal and confidential information about donors or prospective donors outside the work environment, and within the work environment only as appropriate
  - Not take unfair advantage of a donor or prospective donor for their own advantage or benefit
  - Principals, directors, managers and employees also have a duty to disclose to their organization all conflicts of interest and all situations that might be perceived as a conflict of interest
- For more information, see “Consumer Tipsheet – Charitable Fundraising”: <http://www.servicealberta.gov.ab.ca/1011.cfm>

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**F. CRA'S PROPOSED NEW FUNDRAISING POLICY**

- On March 31, 2008, CRA released a Consultation Paper for a proposed policy ("Fundraising Policy") to provide registered charities with information pertaining to the use of resources for fundraising and the limits imposed by law
- Consultation open until July 31, 2008
- The Fundraising Policy will assist charities by:
  - Explaining how to distinguish between fundraising and other expenditures
  - Clarifying how to classify and report activities intended both to raise funds and advance charitable programming

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- Explaining when fundraising activities may preclude registration or result in revocation of registration
- Explaining what factors are considered by CRA when assessing whether the fundraising undertaken puts a charity's registration status at risk
- Fundraising not a charitable activity
  - Courts have determined that fundraising is not charitable in-and-of-itself
  - Costs of fundraising generally cannot be reported as charitable expenditures and fundraising activities are not normally treated as advancing a charity's charitable purpose

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- Allocation of fundraising expenses vs. charitable expenses
  - In general, charities are to report on their T3010A return as fundraising expenditures all costs related to any activity that includes a solicitation of support or is undertaken as part of the planning and preparation for future solicitations of support, unless it can be demonstrated that the activity would have been undertaken without the solicitation of support

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– To demonstrate that the activity would have been undertaken without the solicitation of support, charities must demonstrate either A or B below:

A. Substantially all of the resources devoted to the activity advance an objective other than fundraising

or

B. All of the following apply to the activity:

1. The main objective of the activity was not fundraising based on the resources devoted to fundraising in the activity, the nature of the activity, or the resources used to carry it out

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2. The activity does not include ongoing or repeated requests, emotive requests, gift incentives, donor premiums, or other fundraising merchandise

3. The audience was selected for reasons other than their ability to give

4. Commission-based remuneration or compensation derived from the number or amount of donations is not being used

– Where the test in A is met, all costs for the activity may be allocated as non-fundraising expenditures on the T3010A return

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– Where the tests in B are met, a portion of the costs for the activity may be allocated on the T3010A return as non-fundraising expenditures, and a portion as fundraising expenditures

– In some instances, even if the activity would not have been undertaken without the solicitation of support, charities may be allowed to allocate a portion of the costs other than to fundraising expenditures, where the activity also demonstrably furthers one of the charity’s purposes

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- **The Fundraising Policy sets out:**
  - **Conduct considered as decreasing the risk of unacceptable fundraising (e.g. prudent planning process, good staffing process, etc.)**
  - **Conduct considered as increasing the risk of unacceptable fundraising, e.g.**
    - **Sole-sourced fundraising contracts and/or non-arm's length fundraising contracts without proof of fair market value**
    - **Activities where most of the gross revenues go to contracted non-charitable parties**

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- **Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations**
- **Total resources devoted to fundraising exceeding total resources devoted to program activities**
- **Misrepresentations in fundraising solicitations or disclosures about fundraising or financial performance**
- **Combined fundraising and charitable program activity, where contracted to a party that is not a registered charity or that is compensated based on fundraising performance**

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- **Other circumstances that the CRA may consider (presumably as mitigating factors)**
  - **Small charities or charities with limited appeal**
  - **Charities that are investing resources in donor acquisition or other types of fundraising in which the return will not be realized in the same year in which the investment is made**
  - **Charities whose main or major purpose is to make gifts to qualified donees, or to one or more registered charities and as a result have a different cost structure than charities that carry on their own activities**

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- Charities whose activities include lotteries or charitable gaming that is regulated provincially
- Charities engaging in cause-related marketing initiatives
- Charities with extraordinary spending, relative to their size, on infrastructure to ensure compliance with this fundraising policy
- The Fundraising Policy sets out an evaluation grid, which is based upon a ratio of fundraising costs to fundraising revenue, which is different than the 80/20 disbursement quota

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- The ratio of fundraising costs to fundraising revenue during a fiscal period will place a charity in one of five categories ranging from rarely acceptable to acceptable:
  - Rarely acceptable: More than 70% (charity nets less than 30%)
  - Generally not acceptable: 50% to 70% (charity nets 30% to 50%)
  - Potentially not acceptable: 35.1% to 49.9% (charity nets 50.1% to 64.9 %)
  - Generally acceptable 20% to 35% (charity nets 65% to 80%)
  - Acceptable Less than 20% (charity nets more than 80%)

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- G. DONOR'S RIGHTS AND REMEDIES IN FUNDRAISING**
- General exposure to liability involving donors
    - Misrepresentation involving issuance of charitable receipts and/or the amount
    - Failure to comply with donor restrictions
    - Failure to disclose excessive fundraising costs
    - Detrimental reliance upon charitable endorsements
    - Detrimental reliance upon improper tax advice involving donations
    - Breach of fiduciary duty and/or breach of trust in applying funds to charitable purposes

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- Donor’s Statutory Rights
  - CFA (Alberta)
    - Under s. 53, a court application may be brought by “a person who has made a contribution to a charitable organization”
    - If the Court is satisfied that a charitable organization is not using the contributions it receives as a result of a solicitation for the charitable purpose stated or implied in the solicitation, the Court may:

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- Require a charitable organization or any of its principals, directors or managers to return a contribution to the donor or to pay to the donor a sum equivalent to the contribution
- Require a charitable organization and its principals, directors and managers to use a contribution for the charitable purpose for which it was donated
- Make a declaration respecting the use or misuse of contributions by a charitable organization, or
- Make any other order that the Court considers to be appropriate

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- In addition, s. 55 provides that non-compliance with key CFA provisions constitutes an offence, punishable by a fine of not less than \$1000 and not more than “\$100,000 or 3 times the amount that the defendant acquired as a result of the offence”
  - Every “principal, director, manager, employee or agent who authorized the contravention or failure or assented to it or acquiesced or participated in it is guilty of an offence and is liable to the penalty...whether or not the corporation has been prosecuted or convicted” (s. 55(3))

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- Similar provision applies for partners in a partnership (s. 55(4))
- Under s. 56, a justice who convicts a defendant of an offence may, on the application of a person aggrieved, order the defendant to also pay to the applicant an amount as compensation for the loss
- The *Income Tax Act* (Canada)
  - Informal complaint to CRA
  - Resulting audits
  - Receipting and disbursement violations

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**G. AVOIDING LIABILITY FROM TESTAMENTARY CHARITABLE GIFTS**

- Reducing legal risks from estate planning programs
  - Shift the legal risk away from the charity
    - Download the risk to professionals, i.e. accountants or lawyers, to establish evidence of due diligence
    - Raise the shield of liability insurance whenever possible, if available
    - Return any original wills or codicils to donors or their lawyers

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- Avoid circumstances conducive to allegations of undue influence
  - Directing work to a particular lawyer
  - Paying for a portion of donor's legal costs
  - Acting as either an estate trustee (executor) or attorney under a power of attorney
  - Preparing a will or power of attorney
  - Providing advice on how to structure disposition clauses in a will
  - Providing recommendations on how much of the estate should be given to a charity or charities in general

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- **Completing the will guide on behalf of the testator instead of only assisting with background information**
- **Meeting with the lawyer when the donor gives instructions for the will**
- **Being present when the will is being signed**
- **Offering to store the original will, codicil to a will, or power of attorney**
- **Managing testamentary gifts**
  - **Ensure that a copy of the will is received and carefully review charitable gift provisions**
  - **Review any applicable donor restrictions before agreeing to receive the gift**

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- **Require progress reports on the administration of an estate**
- **Request the distribution of gifts to the estate at the earliest opportunity**
- **Have legal counsel review estate releases as the charity cannot sign an indemnity for money or cause of action beyond what the estate would have otherwise been liable for**
- **Have legal counsel review estate accounts before signing estate releases**
- **Review appropriateness of investments**
- **Ensure that tax credits are used against 100% of income in the year of death and carried back one year, if applicable**

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- **Make sure that only duly authorized signing officers execute the estate release**
- **Resist voluntary renouncement of a gift**
  - **A charity may be asked to renounce a testamentary gift in situations of financial hardship involving family members of the deceased**
  - **There is no legal authority for a charity to unilaterally renounce a gift**
  - **Even court authorization for a renunciation of a testamentary gift is unlikely**
  - **The charity therefore has a fiduciary obligation to pursue testamentary gifts**
- **Ensure that testamentary gifts continue to honour outstanding pledges**

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**H. AVOIDING LIABILITY FROM DONOR RESTRICTED CHARITABLE GIFTS**

- The difference between unrestricted and donor restricted charitable gifts
  - What is an unrestricted charitable gift?
    - An unrestricted charitable gift is a gift to the charity that is not subject to any restrictions or limitations
  - What is a donor restricted charitable gift?
    - A donor restricted charitable gift is a gift that is subject to binding restrictions, conditions or limitations

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- Instances of breach of trust involving donor restricted charitable gifts
  - Diverting a fund to another application
  - Withholding a fund
  - Pooling restricted funds with funds of another donor
  - Encroaching on the capital of an endowment fund
  - Altering the terms of a trust deed
  - Borrowing from a restricted fund
  - Using surplus funds from a fundraising appeal for a different purpose

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- Altering terms of a donor restricted fund without court authorization
- Can a donor restriction be unilaterally varied?
  - Only a court can vary a donor restricted charitable gift on a *cy prés* application
  - Exceptions are
    - Gift reverting to the donor on a failed *cy prés* application
    - Gift reverting to the donor on the failure of either a condition precedent or a condition subsequent

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- **How should donor restricted gifts be managed once received?**
  - Identify the nature of the charitable gift
  - Review and approve donor restrictions
  - Effective ongoing management of donor restricted charitable gifts
    - Deposit into the bank account of the named charity
    - Invest fund in accordance with applicable investment power
    - Do not borrow against restricted fund

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- **How can donor restricted charitable gifts be avoided in the first instance?**
  - Encourage unrestricted gifts
  - Alternatively, encourage the use of non-binding directions
  - Advise donors that all gifts are deemed to be unrestricted unless specifically stated otherwise

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- **Preventative steps to reduce liability involving donor restricted charitable gifts**
  - Public fundraising appeals should state that any surplus funds will be used for the general charitable purposes of the charity
  - Ensure that donor restricted gift includes a *cy prés* clause that will allow the charity to amend the purpose
  - Ensure that documentation creating donor restricted charitable trusts include the words “in trust”

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- **Protecting donor restricted charitable gifts**
  - **Impact of the *Christian Brothers Ont. Court of Appeal* decision**
    - **Claims against charities may increase**
    - **Special purpose trust endowments will be at risk to creditors of the charity**
    - **The ability of donors to create enforceable restricted gifts will be weakened**
    - **Donors will be reluctant to give large gifts directly to an operating charity**
  - **Developing a strategy in response**
    - **Utilize an arms length parallel foundation**
    - **Utilize a community foundation or trust company**

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- **Structure gift as a determinative gift with a gift over to another charity**
- **For more information see [www.charitylaw.ca](http://www.charitylaw.ca) article on “Donor Restricted Charitable Gifts A Practical Overview Revisited II” Part I and Part II – April 21, 2006**
- **The B.C. *Charitable Purposes Preservation Act***
  - **Proclaimed in force in B.C. on March 8, 2007**
  - **Intended to address uncertainty in the protection of donations given for a specific charitable purpose, and seeks to prevent such donations from being used for objects other than those intended by the donor**

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- **Comparison to conditional gifts**
  - **What is the nature of a conditional gift?**
    - **A conditional gift involves the charity becoming the beneficial owner of the gift subject to being defeated by a condition**
    - **With a special purpose charitable trust, the charity never becomes the beneficial owner of the gift but instead holds it in trust**
  - **Receipting conditional gifts**
    - **Condition precedent gifts cannot be receipted**
    - **Condition subsequent gifts may be receiptable:**
      - **Reversion to donor precludes receipting**
      - **Reversion to another charity can likely be receipted**

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**I. AVOIDING LIABILITY IN GIFT AND FUNDRAISING PROGRAMS**

- Gifts of Shares
  - Potential liability in relation to improper valuing and receipting of shares of publicly traded companies
    - Need to review CRA position on determining fair market value
    - Need to review factors outlined by CRA in valuing shares as set out in Registered Charity Newsletter No. 12
    - Caution needed in valuing flow-through shares. See “Donation Tax Shelters and Flow-Through Shares”, available at <http://www.carters.ca/pub/seminar/charity/2008/tctlm0129.pdf>

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- Gift of shares or interests in a business will be subjected to the *Charitable Gifts Act* (Ontario)
  - Charities can not own more than a 10% interest in a business for longer than 7 years
  - If a charity owns more than a 50% interest in a business then reporting requirements to PGT apply
- Gifts of real estate
  - 21 year restriction on leasing property under the *Religious Societies’ Land Act* (Alberta)
  - 40 year restriction on leasing property under the *Religious Organization Land Act* (Ontario)
  - 3 year restriction on leasing property under the *Charities Accounting Act* (Ontario)

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- Liability for toxic property and need for environmental assessment
- Need for due diligence searches
- Inability of charity to manage real property
- Receiving used “gifts in kind”
  - Need for appraised fair market value
  - Determining the correct eligible amount of the receipt
  - Potential liability to third parties from using recycled property
- Self insured gift annuities
  - The difference between self insured and reinsured gift annuities

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- Self insured gift annuity
- Reinsured gift annuity
- Legal risks associated with self insured annuities
  - Lack of corporate authority
  - Compliance issues with the *Insurance Act* (Alberta)
  - Operational financial risks
  - Restrictions on foundations issuing annuities
- Debt instruments forgivable on death
  - Need testamentary instrument to forgive debt
  - If not properly forgiven, will become an asset owing to the estate

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- Transferring capital funds between charities
  - Ensure that there are charitable objects to permit the transfer of funds
  - Identify donor restricted charitable gifts
  - Identify impossible or impractical donor restrictions
  - Change of trustees by deed of trust
  - Unrestricted funds to be applied for original charitable purpose
  - Calculate inter-charity disbursement quota

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- Investment issues in fundraising
  - Determine which investment powers apply and in what jurisdiction
  - Adopt and implement an investment plan
  - Investment plan needs to comply with *Trustee Act* (Alberta) particularly for delegation
  - Investment plan needs to incorporate and override the investment plan and/or agency agreement of an investment manager
  - See [www.charitylaw.ca](http://www.charitylaw.ca), Charity Law Bulletin #8 and “Looking a Gift Horse in the Mouth Avoiding Liability in Charitable Fundraising” article for information on the rules in Ontario

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- **Managed or pooled investment of charitable funds**
  - Does the recipient charity have the corporate power to operate a pooled fund?
  - Does the investment power of each participating charity permit it to invest charitable monies by pooling monies with a third party?
  - Does the *Loan and Trust Corporations Act* (Alberta) have application?
  - Does the *Securities Act* (Alberta) have application?
  - Is court authorization required to pool investment funds of various charities?

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- **Federal *Competition Act* - Deceptive telemarketing & false or misleading misrepresentation**
  - Definition of “business” includes the raising of funds for charitable or other non-profit purposes
  - The *Competition Act* does not apply to fundraising that is solely charitable in purpose
  - However, if part of the purpose of the fundraising includes promoting products or services, the *Competition Act* may apply
  - Telemarketing is prohibited unless there is statutorily mandated disclosure, which includes disclosure of the following:

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- The identity of the caller
- The nature of the product or business interest being promoted
- The purpose of the communication
- The price of any product promoted
- Material restrictions, terms or conditions of delivery
- In addition, the *Competition Act* prohibits anyone engaged in telemarketing from making a representation that is false or misleading in a material respect

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- The prohibition on false or misleading representations applies to telemarketing, door-to-door solicitation, and items offered for sale by the charity
- A false or misleading representation does not require that it be proven that any person was deceived or misled
- Violation of the *Competition Act* constitutes a criminal offence
- A due diligence defence is available
- Directors and officers of a charity can be held personally liable

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- Telemarketing and the National Do Not Call List
  - On July 3, 2007 the Canadian Radio-Television and Telecommunication Commission (CRTC) released telecom decision CRTC #2007-48
  - This decision established a National Do Not Call List (“NDNC”) but registered charities have been exempted from the rules and guidelines of the NDNC list
  - However, with respect to individual Do Not Call lists, registered charities must continue to maintain their own lists and honour consumer requests not to be called

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- This decision also removed a requirement, originating in a 2004 decision, that a toll free number manned during business hours must always be provided to the consumer at the beginning of a call
  - However, a contact number must still be provided when requested
  - The number must be local or toll free
  - The number must be answered by an individual or voicemail and returned in three business days

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- On December 21, 2007, the CRTC named Bell Canada as the NDNC list operator to manage the filing of complaints while the CRTC maintains the roles of investigator and issuer of notices of violation and monetary penalties
- On January 28, 2008 the CRTC announced that, “[a]ll telemarketers, *including those making exempt calls*, will pay fees to the investigator to cover its costs ...”
- Charities, although exempt from the rules of the NDNC list, will be required pay levies to help finance its NDNC list activities

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- The fee amount has not yet been determined
- CRTC expects to launch the NDNC list by September 2008
- Legal issues involving fundraising on the internet
  - Territorial jurisdictional issues
  - Intellectual property law issues
  - Potential for civil action from the internet
  - Domain names, trade-marks and the internet
  - Marketing and advertising on the internet
  - PIPEDA and provincial privacy legislation

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- Legal issues in sponsorship arrangements
  - Distinguishing between receiptable donations and non-receiptable sponsorship payments
  - The importance of documenting sponsorship arrangements
  - Protecting and licensing trade-marks in sponsorship arrangements
  - Liability exposure from sponsorship arrangements

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- **Fundraising Liability and Anti-terrorism**
  - Charitable organizations will be impacted as a result of:
    - Broadly worded “Super *Criminal Code*” terrorist offences under the *Anti-terrorism Act*
    - A new certificate process for the deregistration of charities under the *Charities Registration (Security Information) Act*
    - Money laundering legislation extended to include terrorist financing under *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
  - For more information, see [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

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- If a charitable organization or any of its principals, directors or managers was named in a certificate signed under the *Charities Registration (Security Information) Act* (Canada), in the previous five years, the Minister has grounds to refuse to register or renew the registration of the charitable organization under the CFA (s. 15(2)(b.1))
- The Minister may also suspend or cancel the registration of a charitable organization on the same grounds (CFA: s. 46(2)(c.1))
- Similar provision applies to fund-raising businesses (CFA: ss. 23(2)(b.1), 46(2)(c.1))

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- **Due diligence response**
  - Need to become familiar with specifics of anti-terrorism legislation
  - Need to establish due diligence policy to comply with the law
  - Need to conduct due diligence review of directors, officers and key individuals
  - Monitor how monies are being raised and disbursed
  - Review and monitor international relationships, i.e. agency agreement and joint venture
  - Need release and indemnities from third parties

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